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CORRESPONDENCE.

ATTACHMENT—REMOVAL OF GOODS IN DUE COURSE OF TRADE.

Editor Virginia Law Register :

The cases of *Clinch River Mineral Co. v. Harrison* (91 Va. 122), and *Offerdinger v. Ford* (92 Va. 636), if they do not present a legal conundrum, certainly leave the average legal mind in great doubt as to the true reasoning upon which the apparent conflict in the two cases can be reconciled. To me I confess they present a conundrum, and as you were of counsel in the latter case whose views prevailed in the court, I will ask you to solve it for me.

It is this: A "is removing, intends to remove, or has removed" his property out of the State, so that execution on a judgment would be unavailing for his creditors (sec. 2959 Code of 1887), but the removal is made in the regular course of trade for the purpose of disposing of his property, and the proceeds are to be brought back into the State and reinvested in the business; therefore, it was ruled in the first named case, that such a "removal" did not come within the application of the statute, but was an exception, and was not "sufficient cause" for a creditor of A to sue out an attachment against him.

Now B, engaged in the wholesale boot and shoe trade conducted on leased premises, "intends to remove, or is removing, or has, within thirty days, removed his effects (stock) from such premises," for the purpose of supplying his orders and in the regular course of business (the proceeds of which are to be brought back and reinvested), so that "there will not be left on such premises" sufficient property to pay the rent due, or to become due, within a year (sec. 2962 Va. Code), but it is ruled in *Offerdinger v. Ford* that "the statute makes no exceptions in favor of any one" removing his property in due course of trade, and, therefore, such a removal from the premises (not from the State,) is sufficient cause to support an attachment sued out by the lessor-creditor, for all the rent due, or to become due, within a year. In other words, it appears from this case that if the parties in the case of *Clinch River Mineral Co. v. Harrison* had occupied the relation of lessor and lessee instead of the relation of ordinary creditor and debtor, and the lessor had proceeded by suing out an attachment for rent under section 2962, instead of proceeding as a creditor under section 2959, that in this event the removal alleged by the complainants, Harrison and others, and admitted by the defendants, would have been "sufficient cause" for an attachment for rent.

Now how can you distinguish these two cases so that the apparent conflict can be reconciled, and at the same time each case may rest upon a reason and principle which would not support the same ruling in the other case? I have been unable to think of any principle that will warrant a distinction and justify a judicial construction which engrafts an exception to the statute applying to a debtor who is not a lessee, and refuses to allow the same exception to the application of identically the same words in the section which applies to a debtor who is a lessee. Granting that a court has the power to enlarge or abridge the application of the plain words of a statute whenever, in its opinion, wisdom or public policy demand it, the reason and wisdom of the ruling in *Clinch River Mineral Co. v. Harrison* is

obvious, but it is not obvious why the reasoning upon the same facts, when the proceedings were had under section 2962, would not lead the court to the same result. If the exception was to be put in the statute at all, it seems to me that there was greater reason for it (or, rather, less reason against it) in the case of a lessee than in case of the debtor, for, in the former case, the property remains in reach of an execution, while in the latter case it would leave the State but for the attachment; and the lessor has another remedy also, while the ordinary creditor has no other.

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[If either of the decisions referred to by our correspondent is erroneous, it is the latter—*Offerdinger v. Ford*. The decision in the first—*Clinch River etc. Co. v. Harrison*—seems clearly right. The statute which authorizes an attachment in case the debtor is removing his goods out of the commonwealth, was obviously not intended to apply to an honest shipment of the product of a business concern to a market outside of the State, in the due course of business, with the *bona fide* intention that the proceeds shall be remitted back to the shipper in the home State. In such case, no harm is done to creditors—no property is put beyond the reach of the local courts—and creditors are in no wise impeded in the collection of their debts. A general creditor has no semblance of a lien on the property of his debtor, and no right to insist that it shall not be converted from one form into another, or that it shall be restricted to a particular locality within the State. His only right in this respect is to demand (where there is not otherwise sufficient property of the debtor to pay the creditor's claim) that the permanent location of the debtor's property be within the State.

But with respect to landlord and tenant, the situation is clearly different. The landlord has a *quasi-lien* on the goods on the premises. The landlord looks not so much to the general ability of the tenant to pay, as to his right *in rem*. He is therefore interested in the form which the security shall retain, as well in the location of the goods on the premises. The removal of the goods by sale, and their conversion into cash, while not lessening the tenant's general ability to pay, does materially affect the landlord's peculiar remedy by distress. If the tenant actually reinvests the proceeds in other tangible personal property, which he brings upon the premises and substitutes in the place of the property removed, of course the landlord is not injured. But the landlord cannot see to this application of the proceeds, nor compel such substitution. Whether proof that the tenant intended, in good faith, to substitute other goods for those sold and removed, by replenishing his stock with the proceeds of his sales, would have altered the result, is not clear. There was no such proof in the principal case, but the contrary distinctly appeared from the testimony. The opinion would, however, indicate that this fact would not have altered the situation.

The court apparently thought the distinction between the two cases too obvious for argument, and does not even cite the former case in the opinion in the latter. The distinction, while clear to our mind, seems close enough to have called for some discussion, and it is not surprising to find difficulty encountered in reconciling the two cases.—EDITOR VIRGINIA LAW REGISTER.]